Supreme Court, U.S.
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No. 99-1011

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY and JOHN HECHINGER,

Petitioners,

v.

NOVANT HEALTH SOUTHERN PIEDMONT REGION, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review the decision of the Supreme Court of North Carolina because it is based on an independent and adequate state law ground?

2. Did the Supreme Court of North Carolina limit Petitioners' right of access to civil court proceedings and records in a manner that is narrowly drawn, consistent with First Amendment case law and does not call for review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Presbyterian Health Services Corp., the original defendant in this case, has been acquired and is now Novant Health Southern Piedmont Region, LLC, a North Carolina limited liability corporation which operates two hospitals in the Charlotte, North Carolina area. Its parent corporation is Novant Health, Inc. and there are no publicly held companies that own 10% or more of the stock of the Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	4
I. This Court Lacks Jurisdiction To Review The Decision Of The Supreme Court Of North Carolina Because It Is Based On An Independent And Adequate State Law Ground	4
A. The North Carolina Supreme Court's Decision that Under State Procedural Law the Trial Court Properly Denied Petitioners' Motion to Intervene Constitutes an Independent and Adequate State Law Ground	5
B. The North Carolina State Procedural Law on Intervention Adequately Protects Petitioners' Due Process Rights and Is Not Governed by the First Amendment	7

Contents

Page

II. The Supreme Court Of North Carolina's Ruling On Petitioners' Right Of Access Is Narrowly Drawn, Consistent With Federal Law And Does Not Call For Review By This Court 11

A. The North Carolina Supreme Court's Ruling on the State Constitutional Right of Access Guarantees Petitioners Rights that Are at Least Equivalent to Their First Amendment Rights 12

B. The North Carolina Supreme Court Properly Applied Federal Law to Determine the Petitioners' First Amendment Right of Access to the Court Proceedings and Records in this Case 17

C. The North Carolina Supreme Court's Rulings Denying Petitioners Access to the Records and Proceedings at Issue in this Case Did Not Prevent It From Allowing Access Under Appropriate Circumstances 19

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) 8

Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) 4

Eustis v. Bolles, 150 U.S. 361 (1893) 4

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) ... 5

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 13

Henry v. Mississippi, 379 U.S. 443 (1965) 7

Herb v. Pitcairn, 324 U.S. 117 (1945) 4

Michigan v. Long, 463 U.S. 1032 (1983) 5

Michigan v. Tyler, 436 U.S. 499 (1973) 7

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 8, 14

Press-Enterprise Co. v. Superior Court II, 478 U.S. 1 (1986) 8, 14

Cited Authorities

Page

Publicker Indus. Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) 13

Reece v. Georgia, 350 U.S. 85 (1955) 8

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 6, 8, 13

Statutes:

28 U.S.C. § 1257 (1994) 1, 4

North Carolina General Statutes § 1A-1, Rule 24 ..... 6, 7, 8, 10

North Carolina General Statutes § 131E-95 ..... 1, 2, 15, 19, 20

United States Constitution:

First Amendment ..... *passim*

Rule:

Sup. Ct. R. 10 11

Other Authority:

N.C. Const. art. I, § 18 ..... 12, 14

The Respondent, Novant Health Southern Piedmont Region, LLC, respectfully requests that this Court deny the petition for writ of certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF JURISDICTION

Although Petitioners contend that jurisdiction exists pursuant to 28 U.S.C. § 1257 (1994), this Court should not review the decision rendered by the Supreme Court of North Carolina because it is based on adequate and independent state law grounds.

STATEMENT OF THE CASE

This case arises out of issues of state law — the application of North Carolina General Statutes § 131E-95 to Petitioners' attempt to gain access to the confidential records and information generated by a medical peer review committee. That committee was appointed by Respondent's hospital to evaluate the competence of A. Ron Virmani, M.D., a physician on its medical staff. Under Section 131E-95, the records prepared by the medical peer review committee are protected as confidential.

In the underlying case, Dr. Virmani filed suit against Respondent challenging its decision to terminate his clinical privileges to practice medicine at Respondent's hospital. Dr. Virmani attached as exhibits to his complaint two peer review records, namely the peer review committee's report, which contained its confidential evaluation and conclusions regarding Dr. Virmani's competency, and its summary of its findings. Respondent promptly moved the trial court for an order sealing the confidential peer review records and

closing the courtroom during any discussion of the confidential information contained in the records. Thereafter, in order to respond effectively to the peer review records presented by Dr. Virmani, it was necessary for Respondent to submit certain additional peer review records to the trial court in conjunction with a motion to seal the records and to close the courtroom during discussion of the information contained in the records. Relying on the confidentiality requirements for peer review records set out in Section 131E-95, the trial court ordered those portions of the hearing concerning the peer review records closed to the public. Petitioner John Hechinger, a reporter for Petitioner Knight Publishing Company, objected to the closing. Subsequently, Petitioners filed a motion to intervene in Dr. Virmani's suit against Respondent to challenge the trial court's orders closing portions of the hearings and sealing the peer review records. Petitioners presented their motion to the trial court *ex parte*, without giving notice to the parties. The trial court ultimately denied the motion to intervene.

Petitioners then filed a notice of appeal and petitions for extraordinary writs, including a petition for writ of certiorari, with the North Carolina Court of Appeals. In its decision, the North Carolina Court of Appeals overturned the trial court's determinations, finding that the North Carolina Rules of Civil Procedure authorized Petitioners' intervention for the purpose of challenging the trial court's orders to seal records and close proceedings, and the North Carolina Constitution guarantees the public and the press a near-absolute right of access to all court proceedings and court records. The North Carolina Court of Appeals directed the trial court to unseal all of the confidential peer review records previously sealed.

Respondent sought review of the North Carolina constitutional and procedural issues in the North Carolina Supreme Court (hereinafter "the court"). The North Carolina Supreme Court heard argument and ruled on two legal issues: (1) the state procedural law issue of whether Petitioners were entitled to intervene in the state court action brought by Dr. Virmani; and (2) the substantive issue of whether Petitioners have an absolute right of access to court proceedings and court records. In a unanimous decision, the court determined that, under North Carolina law, the trial court properly denied Petitioners' motion to intervene in the proceedings. The court also decided that a presumptive right of access to state court proceedings and records exists under both the State and Federal Constitutions. Nonetheless, the court ruled that the compelling government interest in preserving the confidentiality of the peer review records at issue in this case outweighed the public's right of access to the closed portions of the hearing and the sealed peer review records. The court further held that, under North Carolina law, those peer review records which Dr. Virmani attached to his complaint and filed with the clerk of court became public records when they were filed and Petitioners were entitled to have access to them.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA BECAUSE IT IS BASED ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND

Notwithstanding the jurisdiction of the United States Supreme Court (hereinafter "this Court" or "the Court") to review decisions rendered by state courts set out in 28 U.S.C. § 1257(a) (1994), this Court has long held that it lacks jurisdiction to review a state court decision when it rests on an independent and adequate state law ground. *See Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Eustis v. Bolles*, 150 U.S. 361, 366 (1893). This Court has articulated the rationale for the independent and adequate state ground doctrine as follows:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). In other words, the Court will not review a state court decision if a reversal of the state court's ruling on federal law will not

alter the outcome in the case because the result is independently supported by the state court's decision on state law grounds. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

In the seminal case *Michigan v. Long*, 463 U.S. 1032 (1983), this Court re-evaluated its approach to determining whether a state court decision is based on an independent and adequate state ground and adopted the "plain statement" rule. Under this rule, if the state court opinion indicates clearly and expressly that it is based on a "bona fide separate, adequate and independent state ground," this Court has no jurisdiction to review it. *Id.* at 1041. If, however, it is not clear from the opinion that the state court relied upon such a ground and if it fairly appears that the state court rested its decision primarily on federal law, the Court will assume that jurisdiction exists. *See id.* at 1042.

A. The North Carolina Supreme Court's Decision that Under State Procedural Law the Trial Court Properly Denied Petitioners' Motion to Intervene Constitutes an Independent and Adequate State Law Ground

In the present case, the opinion of the North Carolina Supreme Court expressly indicates that its ruling on Petitioners' motion to intervene is based squarely on state law. Petitioners sought to intervene to challenge the trial court's decision to close portions of the proceedings and seal certain records by filing a "motion for intervention and motion to open the proceedings to the public and news media." The trial court ultimately denied the motion.

In challenging the denial, Petitioners argued in the court below, and again in their Petition, that the trial court erred

in summarily denying their motion to intervene *and* motion to open the proceedings. However, as the North Carolina Supreme Court correctly recognized, Petitioners have mixed two different legal questions: (1) the state procedural law issue of whether Petitioners are entitled to intervene in this case; and (2) the state and federal constitutional issue of whether the trial court erred in closing the proceedings and records to the public. (Pet. App. at 11a.) The North Carolina Supreme Court acknowledged this Court's determination that trial court proceedings in criminal cases may not be summarily closed when the trial court is presented with a First Amendment claim to a right of access. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). However, the North Carolina Supreme Court found that the substantive issue of whether the trial court's findings were sufficient to support closure of the proceedings under the First Amendment "is different from the question of who should be allowed to appear and present the issue in a civil case and how it should be presented." (Pet. App. at 11a.)

Consequently, to decide the issue of who should be allowed to appear and present issues in a state civil action, the North Carolina Supreme Court turned to North Carolina law. Under North Carolina law, motions to intervene are governed by statute. Specifically, North Carolina General Statutes § 1A-1, Rule 24 determines when a third party may intervene as of right or permissively. Applying the requirements of the statute, the North Carolina Supreme Court concluded that Petitioners were not entitled to intervene as of right under Rule 24(a), as they had no direct and immediate interest in Dr. Virmani's wrongful termination action and the denial of the motion to intervene would not result in a practical impairment of the protection of the Petitioners' indirect interest in the case. (Pet. App. at 9a-10a.)

The North Carolina Supreme Court further concluded that the trial court properly exercised its discretion in denying Petitioners permissive intervention under Rule 24(b). Under North Carolina law, permissive intervention rests within the sound discretion of the trial court. The North Carolina Supreme Court found that "there was every reason for the trial court to believe that permitting the [Petitioners] to intervene would — as it has — unduly delay the adjudication of the rights of the original parties," and held that the trial court had not abused its discretion in denying Petitioners permissive intervention. (Pet. App. at 10a-11a.)

In addressing the issue of Petitioners' motion to intervene, the North Carolina Supreme Court properly rejected Petitioners' attempts to interweave a state procedural law question and a federal constitutional law question into a single legal issue. It correctly determined that the motion to intervene was a separate state law issue that did not involve federal law. The North Carolina Supreme Court's opinion clearly reflects that it relied exclusively on Section 1A-1, Rule 24 and applicable North Carolina case law to resolve the issue of Petitioners' motion to intervene, and therefore it is based on an adequate and independent state law ground.

B. The North Carolina State Procedural Law on Intervention Adequately Protects Petitioners' Due Process Rights and Is Not Governed by the First Amendment

As a general rule, this Court has deemed state procedural grounds to be an independent and adequate basis for a decision and sufficient to preclude the assumption of its jurisdiction. *See, e.g., Michigan v. Tyler*, 436 U.S. 499 (1973); *Henry v. Mississippi*, 379 U.S. 443 (1965). The Court

has recognized an exception to this rule, however, when the state procedural requirements deny a party due process of law. *See, e.g., Reece v. Georgia*, 350 U.S. 85 (1955). Petitioners have attempted to take advantage of this exception by contending that the North Carolina Supreme Court's ruling with respect to Section 1A-1, Rule 24 "is an offense to the First Amendment" because it effectively deprived them of procedural due process rights under the First Amendment. (Pet. at 16.) Petitioners claim that the *only* adequate and timely means of challenging the closure of proceedings is through intervention at the trial court level. (Pet. at 13-16.)

The North Carolina Supreme Court specifically addressed this due process argument in its opinion and determined that there were several means other than intervention by which Petitioners could have obtained a full and timely review of the issue of whether the court proceedings and records should be made public, including by: (1) extraordinary writ practice; (2) declaratory judgment action; or (3) use of established remedies in equity. (Pet. App. at 12a.) The court properly concluded that the Petitioners' due process rights were adequately protected because they could obtain a meaningful and timely review of their interests by these other means, which have been successfully used by the media and resulted in at least four decisions by this Court on this precise issue — the media's right of access to court proceedings and records. (Pet. App. at 12a) (citing *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (declaratory judgment action); *Press-Enterprise Co. v. Superior Court II*, 478 U.S. 1 (1986) (*Press-Enterprise II)* (mandamus proceedings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I)* (petition for writ of mandate); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (petitions for writ of

mandamus and prohibition)). Ironically, Petitioners repeatedly cite these decisions to support other aspects of their argument but fail to acknowledge that these decisions make it clear that there are various other methods by which questions as to the First Amendment right of access are frequently and successfully presented. These methods provide meaningful and timely opportunities for the public to be heard and serve to protect their procedural due process rights.

Nonetheless, Petitioners assert that to satisfy the procedural due process requirements of the First Amendment, this Court must grant review of this case and require state courts to allow the press and public to intervene as of right in state court actions to challenge the closure of proceedings. (Pet. at 13-16.) As reflected in the preceding paragraph, the First Amendment does not mandate that state courts allow the media to intervene in a state court action to present a right of access claim. Petitioners would, however, have this Court review the North Carolina Supreme Court's decision to determine whether the First Amendment guarantees the press a mandatory right to intervene in state court proceedings. This sweeping interpretation of the First Amendment has no merit and is a clear infringement on the power of the state courts to address state law procedural issues.

In appealing to this Court for a mandatory right of intervention, Petitioners use broad strokes to describe the North Carolina Supreme Court's ruling on the motion to intervene. They contend that the court's ruling bars the press from intervening and being heard by a trial court in all instances. (Pet. at 4, 16.) In fact, the North Carolina Supreme Court's ruling on the motion to intervene is narrowly drawn.

The court concluded that, under the particular circumstances of this case, the media was not entitled to intervene as of right and that the trial court did not abuse its discretion in denying Petitioners' motion for permissive intervention. (Pet. App. at 10a-11a.) The North Carolina Supreme Court did not state or imply that the media no longer has the right to intervene to challenge the closure of court proceedings or sealing of records. Under Rule 24, the trial court continues to have discretion in deciding motions to intervene.

In sum, although Petitioners repeatedly attempt to meld together the state procedural law issue of their motion to intervene with the substantive constitutional law issue of their motion to open state court proceedings, the North Carolina Supreme Court correctly held that Petitioners' right to intervene is governed exclusively by North Carolina law. Further, because the state procedural requirements of Section 1A-1, Rule 24 did not deny Petitioners due process of law, the court's ruling constitutes an adequate and independent state law ground for the North Carolina Supreme Court's decision.

Having ruled that the trial court properly denied Petitioners' motion to intervene, the North Carolina Supreme Court observed that "it would be appropriate for us to simply reverse the decision of the Court of Appeals without reaching the other issues raised by the Petitioners" because the ruling is dispositive of the case. (Pet. App. at 13a.) However, the court determined it should also address the substantive issue of whether Petitioners had an unqualified right of access to the court proceedings and records in this case. Although there appears to be no controlling law on this issue, it is reasonable for this Court to conclude that because the North Carolina Supreme Court resolved the question of intervention on an

independent and adequate state law ground and because this ruling is sufficient to dispose of the entire case, this Court has no jurisdiction to review the decision. It is clear that the court's ruling on the state procedural law issue must stand; thus, any ruling by this Court on the substantive issue presented by Petitioners would be purely advisory. Therefore, this Court should decline to review the decision.

II.

THE SUPREME COURT OF NORTH CAROLINA'S RULING ON PETITIONERS' RIGHT OF ACCESS IS NARROWLY DRAWN, CONSISTENT WITH FEDERAL LAW AND DOES NOT CALL FOR REVIEW BY THIS COURT

As noted above, the North Carolina Supreme Court also addressed Petitioners' substantive argument that the media and public have an unqualified right of access to the court proceedings and records at issue in this case. The court's ruling on this issue is consistent with the federal courts' rulings on the First Amendment right of access to the courts and does not raise any important federal law questions for this Court to review. Further, contrary to Petitioners' assertions as to the sweeping and drastic nature of the North Carolina Supreme Court's decision, the court carefully addressed each argument and narrowly tailored its rulings to the facts of this case.

Rule 10 of this Court states that petitions for certiorari will only be granted for "compelling reasons." Sup. Ct. R. 10. Although the Rule does not define what constitutes a "compelling reason," it provides examples of "compelling reasons" which will justify review. *See id.* These examples

illustrate that this Court exercises its discretion to review cases that decide important federal questions in conflict with other federal case law rather than cases in which the asserted error is a misapplication of a properly stated rule or erroneous factual findings. As the decision of the Supreme Court of North Carolina raises no important federal questions and is consistent with federal law, the Petitioners have failed to present any compelling reasons for this Court to review the decision.

A. The North Carolina Supreme Court's Ruling on the State Constitutional Right of Access Guarantees Petitioners Rights that Are at Least Equivalent to Their First Amendment Rights

In the present case, the North Carolina Supreme Court was asked to decide whether the North Carolina Constitution gives the public an absolute right of access to civil court proceedings and records. The issue was one of first impression for the court, and it is the only entity that can answer with finality questions concerning the proper construction and application of the North Carolina Constitution. As shown below, the North Carolina Supreme Court interpreted Article I, Section 18 of the North Carolina Constitution in a manner that is consistent with the First Amendment right of access decisions rendered by the federal circuit courts.

Article I, Section 18, provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. There is no parallel open courts provision in the United States Constitution. Thus,

the North Carolina Supreme Court observed, " 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' " (Pet. App. at 31a) (citation omitted). However, recognizing that this Court has held that a qualified right of public access to *criminal* trials is implicit in the First Amendment, *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07 (1982), the North Carolina Supreme Court interpreted the "open courts" provision of the North Carolina Constitution in a manner that is virtually identical to the First Amendment right of access decisions of this Court and the federal appellate courts.

The federal law on the First Amendment right of access provides the framework for the North Carolina Supreme Court's interpretation of the "open courts" provision. The federal appellate courts which have addressed the issue have held that the First Amendment creates a presumptive right of public access to civil proceedings and records. *See, e.g., Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984). In construing the First Amendment right of access in criminal cases and related proceedings, this Court has determined that when the state meets its burden of showing a compelling government interest, the trial court may, in the interest of fair administration of justice, impose reasonable limitations on access to a trial. *See Richmond Newspapers*, 448 U.S. at 582. However, before a trial court may deny access to a criminal trial, the trial court must determine that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest. *See Globe Newspapers*, 457 U.S. at 606-07. This Court also has required the presiding judge to consider

reasonable alternatives before closing criminal proceedings and to make specific findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether closure was proper. *See Press-Enterprise II*, 478 U.S. at 9-10; *Press-Enterprise I*, 464 U.S. at 824.

In its opinion, the North Carolina Supreme Court adopted a strikingly similar, if not identical, approach in construing the right of public access to court proceedings under the North Carolina Constitution. Like the federal circuit courts, the North Carolina Supreme Court interpreted Article I, Section 18 to create a presumptive right of access on the part of the public to attend civil court proceedings and records. Consistent with this Court's approach, it explained, however, that such a right is "subject to reasonable limitations imposed in the interest of the fair administration of justice and for other compelling public purposes." (Pet. App. at 33a.) The North Carolina Supreme Court also adopted this Court's procedural requirements for limiting access and instructed that the trial court must consider alternatives to closure and must "make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access." (Pet. App. at 33a-34a.)

Clearly, the North Carolina Supreme Court interpreted the open courts provision of the North Carolina Constitution in a manner that is fully consistent with the First Amendment right of access as defined by the federal courts and expressly recognized that a presumptive right of access to civil court proceedings and records exists under North Carolina law.

In analyzing Petitioners' state constitutional right of access, the North Carolina Supreme Court noted that the North Carolina legislature has recognized the public's compelling interest in the confidentiality of peer review records by enacting North Carolina's peer review statute, Section 131E-95, and "making the confidentiality of medical peer review investigations part of our state's public policy." (Pet. App. at 34a.) Refusing to rely solely upon the legislature's public policy judgment, however, the North Carolina Supreme Court reviewed the sealed records in this case and determined for itself that in this case the compelling public interest in promoting the public health by encouraging candor and objectivity in the internal workings of medical peer review committees outweighs the public's interest in access to civil court proceedings and records. Therefore, in its view, the trial court properly closed the court proceedings to the public and properly sealed the confidential peer review records tendered to it. (Pet. App. at 36a.)

Apparently hard-pressed to criticize the North Carolina Supreme Court's analysis, Petitioners have resorted to attacking the public policy underlying North Carolina's Section 131E-95. Petitioners characterize the law as nothing more than a "sweetheart deal" between the North Carolina legislature and the state's medical profession and contend that a failure by this Court to take issue with the statute could lead to a proliferation of similar arrangements for the benefit of various industries. (Pet. at 22.)[1] Indeed, Petitioners even suggest that, through its opinion in this case, the North

1. Petitioners' argument betrays their fundamental assumption that this Court sits to supervise and second guess the North Carolina General Assembly's exercise of a uniquely legislative function — balancing important but competing public interests. Their argument should therefore be rejected on principles of federalism alone.

Carolina Supreme Court has placed itself in an "unseemly partnership" with the special interests of the medical profession. (Pet. at 26.) Such allegations ignore the basic fact that the health and well being of the people of North Carolina are — and should be — a vital concern of the North Carolina legislature and constitute a concern that can properly be accorded great weight by the State's highest court. Indeed, the citizens of North Carolina and their elected representatives have an enormous interest in the competence of their doctors. Effective procedures to remove those medical practitioners who endanger the lives or well-being of their patients is obviously critical to this interest. As the North Carolina Supreme Court aptly stated: "[t]he public's interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members." (Pet. App. at 35a.) The court concluded that

> [b]ecause such open and honest communication in medical peer review proceedings help to assure high quality public medical care, maintaining and protecting this confidentiality is in the public's best interest [and] the compelling countervailing public interest in such high quality medical care overcomes the qualified public right to open civil court proceedings and records of those proceedings.

(Pet. App. at 35a.)

In sum, the North Carolina Supreme Court's interpretation of the North Carolina Constitution affords Petitioners a right of access to civil court proceedings and records that is substantially equivalent to the right of access which federal courts have guaranteed under the First Amendment. For powerful and compelling reasons, however, the court ruled that Petitioners' right of access should be limited in this case because of countervailing public interest in high quality medical care. The court's rulings on the constitutional issues do not diminish the rights Petitioners would have under federal law, and it is therefore improper for this Court to review the North Carolina Supreme Court's decision on a uniquely state law question.

B. The North Carolina Supreme Court Properly Applied Federal Law to Determine the Petitioners' First Amendment Right of Access to the Court Proceedings and Records in this Case

Having concluded that Petitioners' North Carolina Constitutional right of access can properly be restricted in this case, the North Carolina Supreme Court also addressed the federal issue of whether Petitioners' First Amendment right of access can be restricted. In doing so, the North Carolina Supreme Court observed that this Court has never expressly decided whether the public has a First Amendment right of access to *civil* proceedings or civil court records, although the Court has noted that civil trials historically have been presumptively open to the public. (Pet. App. at 36a-37a.) With no direct precedent to guide it, the North Carolina Supreme Court considered the issue as any federal appellate court would — by considering relevant cases from this Court and looking to other federal appellate courts for guidance.

Although the North Carolina Supreme Court noted that the federal circuit courts had found a First Amendment presumptive right of access to civil proceedings and records, it observed that this Court has found that First Amendment rights of access are qualified and can, under appropriate circumstances, be restricted. The court also applied this Court's experience/logic test from *Press-Enterprise II* and questioned whether the First Amendment right of access would apply at all in this case. (Pet. App. at 37a.) Nonetheless, the North Carolina Supreme Court relied on its review of federal case law to assume, *arguendo*, that this Court would hold that a qualified First Amendment right of access attaches to civil cases. (Pet. App. at 36a.)

In analyzing the Petitioners' First Amendment right of access in this case, the North Carolina Supreme Court applied the rules established for criminal cases by this Court for restricting the First Amendment right of access. Relying on its previous analysis of the government interest in protecting the confidentiality of peer review information, it concluded that "the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and that no alternative to closure will adequately protect that interest." (Pet. App. at 36a.)

Thus, in ruling on Petitioners' First Amendment right of access to civil court proceedings and records in this case, the North Carolina Supreme Court reasonably assumed that there was a qualified First Amendment right of access and limited that right of access by applying rules that have been laid down by this Court in its First Amendment case law. This reasonable approach to resolving this federal issue clearly does not conflict with federal law and does not

provide a compelling reason for this Court to review the North Carolina Supreme Court's decision on the federal issue in this case.

As discussed above, Petitioners have complained that the government's interest in protecting the confidentiality of peer review information does not justify denying access to the proceedings and records at issue in this case. However, there is simply no basis for Petitioners' contention that this conclusion creates a fundamental federal constitutional question "of the highest order" which the Supreme Court must resolve. Having applied federal First Amendment law consistently with the decisions of this Court and the lower federal courts, the only issue that could possibly remain for this Court to review is the Petitioners' chief complaint that this law was applied in a manner that did not suit Petitioners. Such a claim does not present a federal question worthy of this Court's review.

C. The North Carolina Supreme Court's Rulings Denying Petitioners Access to the Records and Proceedings at Issue in this Case Did Not Prevent It From Allowing Access Under Appropriate Circumstances

Petitioners argue that the North Carolina Supreme Court's decision mandates closure of all proceedings and sealing of all peer review records on the basis of a state statute. In reality, the decision is simply not as sweeping as Petitioners suggest. The North Carolina Supreme Court reviewed North Carolina law on the confidentiality of medical peer review records and proceedings and found a clear legislative intent in Section 131E-95 to protect the confidentiality of peer review records. Nevertheless, the court held that even when records qualify as confidential peer

review documents, there are circumstances under which the press and public are entitled to access to these records. In this instance, the North Carolina Supreme Court concluded that Section 131E-95 did not protect the confidentiality of the peer review records attached to Dr. Virmani's complaint and filed with the clerk because they had become "public records" under North Carolina law. Accordingly, the court held that the media and public were entitled to access to the records and ordered that they be unsealed. (Pet. App. at 18a-19a.) Petitioners, however, studiously avoid any acknowledgment that the North Carolina Supreme Court ruled that the press and public had a right of access to those peer review records which had been filed with the clerk of court.

In their final argument, Petitioners focus on the right of access to court *records* and claim that the North Carolina Supreme Court's decision directly conflicts with federal law because it fails to acknowledge a First Amendment presumptive right of access to "judicial records." (Pet. at 29.) A review of the court's opinion quickly establishes that this argument is without merit. Not only did the North Carolina Supreme Court assume that the First Amendment guarantees a qualified right of access to the records at issue in this case, the North Carolina Supreme Court expressly decided that the North Carolina Constitution guarantees a qualified right of access to civil court records. (Pet. App. at 34a, 41a.) As there is no conflict between the North Carolina Supreme Court's decision and federal First Amendment law, the decision provides no basis for review.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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